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Farah, Youseph and Hourani, Sara ORCID logo ORCID: <https://orcid.org/0000-0001-6348-1014>
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Frustrated at the interface between court litigation and arbitration?

Don't blame it on Brussels I!

Finding reason in the decision of *West Tankers*, and the recast Brussels I

Youseph Farah¹ and Sara Hourani²

1. Introduction

The *West Tankers* decision was criticised for having a regressive impact on the system of international commercial arbitration. Many had hoped that the European Court would deliver a decision which would be informed by pragmatism, and one which would prevent numerous court and tribunal related parallel proceedings occurring across a number of jurisdictions within the EU. Instead, the European Court delivered a principled judgment declaring an anti-suit injunction prohibiting a party from continuing proceedings before a court of a Member State to be contrary to EU law.³

This article is significant because it introduces a complete account of the normative framework that regulates the interface between court litigation and arbitration. It identifies the approach under the system of the Brussels I Regulation, including the recent amendments brought by the revised version of Brussels I. The main finding of this article is that the reasoning of the European Court in *West Tankers* was consistent with EU jurisprudence, and the core values of Brussels I. In particular it shows that the critiques of *West Tankers* often ignore important values that are fundamental to the system of Brussels I, and EU constitutional values.

It is submitted that *West Tankers* has essentially magnified the diversity and cultural distinction among Member States in their approach to parallel proceedings between a court and arbitration. It is this very distinction that led to the unwelcome procedural inefficiencies

¹ Lecturer at the University of Essex.

² Lecturer at the University of Bournemouth.

³ EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil And Commercial Matters, [2001] OJ L12/1.

which accompanied *West Tankers* and its related actions, and it is this very weakness in the normative framework that must be addressed.

The authors reiterate that the relationship between international arbitration and Brussels I is primarily one of scope. However, what is often overlooked is that, from a theoretical standpoint, the debate is equally about values. Brussels I is based on certain values that drive the internal market into a system which improves access to justice, and eliminates unnecessary conflicting decisions. It is one which strikes a balance between power theories and fairness theories. It is further a system which is founded on mutual trust and confidence between Member States.⁴ It will be seen that these values clash with the values that are attributed to the system of international commercial arbitration, and therefore it will be challenging to find solutions to the jurisdictional clash identified above under the system of Brussels I.

Accordingly, this research identifies solutions which will best co-exist with the values of Brussels I. This is done against the backdrop of the recast Brussels I,⁵ which came into force in January 2015. In particular, it is submitted that according greater deference to the arbitral tribunal by greater movement towards the doctrines of ‘prima facie review’ and ‘negative competence-competence’ should mitigate some of the procedural inefficiencies that are likely to arise in situations similar to *West Tankers*.

2. The Issue in *West Tankers* and Related Actions

In August 2000, the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA (‘Erg’) collided in Italy with a jetty owned by Erg and caused damage. Erg recovered compensation from its insurers (Allianz and Generali) up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the difference between the compensated amount and the actual loss in accordance with the

⁴ See recitals 14-16 of the EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments In Civil And Commercial Matters (Recast), [2012] OJ L351/1, which require some form of territorial links with the Member State of the court seised of the dispute. See also recital 21 of the recast Brussels I Regulation, in relation to conflicting judgments and how minimising their occurrence will be in the interests of the administration of justice.

charter-party agreement between the parties, which contained an arbitration clause providing for all or any disputes to be settled by arbitration in London. West Tankers denied liability for the damage caused by the collision. Allianz and Generali brought proceedings in subrogation under Italian law on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

In parallel, on 10 September 2004, West Tankers brought proceedings before the High Court of Justice of England and Wales, seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an anti-suit injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced in Italy. The High Court allowed West Tankers' claims and granted the anti-suit injunction sought against Allianz and Generali. The respondents in return appealed against that judgment to the House of Lords. Their central argument was that the anti-suit injunction was contrary to Brussels I and EU law.

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the House of Lords made a preliminary reference to the European Court, asking whether “*it is incompatible with Regulation No 44/2001 for a court of a member state to make an order to restrain a person from commencing or continuing proceedings before the courts of another member state on the ground that such proceedings would be contrary to an arbitration agreement, even though article 1(2)(d) of the Regulation excludes arbitration from the scope thereof*”.⁶

In parallel, the proceedings in arbitration were continued in London by West Tankers. The tribunal reached an award containing a negative declaration that in accordance with the charter-party agreement, which was determined to be governed by English law, West Tankers was not liable to the subrogated insurers under the terms of the charter-party agreement. West Tankers sought enforcement under section 66 of the (English) Arbitration Act 1996, requesting the High Court in London to order that the arbitrators' award be made a judgment. The motive behind such a request was “to provide themselves with an additional weapon in the Italian proceedings and/or a shield against enforcement if those proceedings

⁶ Case No. C-185/07: *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR I-663.

were to result in a judgment opposite to that arrived at by the arbitrators, i.e. a judgment that the owners were to blame for the collision”.⁷

The insurer defended by stating that, since the award was merely declaratory, it could not be enforced under section 66 of the Arbitration Act 1996. The Court of Appeal confirmed however that under section 66 courts have the power to order judgments to be entered in the terms of an arbitral award even when the award is merely declaratory.⁸

A number of related proceedings followed, engaging both the English courts and arbitral proceedings in London. These will be discussed later in this article. Subsequently, the arbitral tribunal published a fourth partial award concerning two further issues between the parties, and held that the tribunal’s jurisdiction was circumscribed pursuant to the reasoning of the court of the European Union in *West Tankers*, which it held also extended to the grant of equitable damages by the tribunal for breach of the arbitration agreement by Allianz, and any award concerning the difference in any monetary award in favour of Allianz by the Italian court and *West Tankers*’ liability. The tribunal reasoned that exercise of jurisdiction would be in breach of the principle of effective judicial protection, which it held was engaged by the fact that the defendant had a right under Article 5(3) (now Article 7(2)) of the Brussels I Regulation to pursue its proceedings before the Italian court: “Accordingly, we are driven to the conclusion that Community law would not allow an arbitral tribunal, although exercising a parallel jurisdiction, to cross the divide and in effect 'punish' a party for pursuing a course that the European Court itself had approved”.⁹

Following the tribunal’s award, *West Tankers* appealed against that award to the High Court in London pursuant to section 69 of the (English) Arbitration Act 1996. The Commercial Court in London held that “the tribunal was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate”.¹⁰

⁷ *West Tankers Inc. v Allianz SpA* [2012] EWCA Civ 27, paragraph 12.

⁸ *West Tankers Inc. v Allianz SpA* [2012] EWCA Civ 27.

⁹ Paragraph 78 of the fourth arbitral award in *West Tankers Inc. v Allianz SpA* [2012] EWCA Civ 27.

¹⁰ *West Tankers Inc. v Allianz SpA* [2012] EWCA Civ 27, paragraphs 51-78.

Meanwhile, West Tankers approached the Italian court with a request for the recognition and enforcement of the third award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Allianz has challenged those proceedings.

The case of West Tankers and its related actions, whether in litigation or in arbitration, manifest the inefficiencies likely to arise in complex parallel proceedings. Whilst the probability of parallel proceedings is rather small, it is by no means trivial. The following is a brief summary of proceedings that have occurred either in parallel or in series, and which have concerned similar or related matters.

- (1) Proceedings based on subrogation brought by the insurers before a national court [Proceedings in Italy].
- (2) Arbitral proceedings in London concerning the same or similar subject matter as the subrogation proceedings before the Italian court.
- (3) Proceedings brought before the High Court of Justice in England requiring a party to cease judicial proceedings and resolve the dispute by arbitration [the anti-suit injunction before the English Court], which were appealed to the House of Lords, and ultimately referred to the European Court.
- (4) Enforcement proceedings in respect of an arbitral award holding that West Tankers was not liable to Erg in accordance with the charter-party agreement which were brought before the High Court in London, and later appealed to the Court of Appeal.
- (5) Proceedings before an arbitral tribunal in London for damages for the breach of the arbitration agreement, and a declaration that the ship owners [West Tankers] were not liable for the difference between the sum awarded by the Italian courts and its liability, if found, owed to Erg.
- (6) Enforcement proceedings in respect of an arbitral award in an EU Member State, concerning a debt for which the very foundation is pending before a national court of an EU Member State [the Italian Proceedings].
- (7) Proceedings concerning the London award brought before a national court in Italy.

- (8) Appeal on a question of law under section 69 of the (English) Arbitration Act before the High Court in London challenging the fourth arbitral award which held that the jurisdiction of the tribunal was circumscribed by the decision of the European Court [High Court in London].

3. The Legal Issues leading to the European Court's Judgment in *West Tankers*

Before we are able to appreciate the European Court's reasoning in *West Tankers*, it is important to assess the reasoning which was given by the English High Court for its decision to order Allianz and Generali to cease litigation in Italy and submit to arbitration in London, and which was later endorsed, albeit symbolically, by the House of Lords when making a preliminary reference to the European Court. It is important to understand this, because only then will we be able to measure the impact that *West Tankers* has had on international arbitration.

3.1 The Reasoning of the English Courts

The respondents in the case [Allianz and Generali] submitted at the High Court in London, among other claims, that the injunction should be discharged because it would be the duty of the Italian court to stay the proceedings brought before it in accordance with Article II(3) of the New York Convention 1958 if satisfied that the proceedings were brought in breach of a valid arbitration agreement and which was binding on Allianz and Generali. The respondents argued that Article II(3) of the New York Convention left it to the “*courts where the court proceedings had been commenced to determine whether those proceedings should be stayed and where that court was [a court of] a Member State of the EU it would be inappropriate to anticipate the determination of that issue by an anti-suit injunction.*”¹¹

The respondents further argued that granting an anti-suit injunction would be incompatible with Brussels I and with “*the philosophy underlying the ECJ in the decision of Turner v Grovit*”.¹² Moreover, the respondent submitted that “*the granting of an anti-suit injunction by*

¹¹ *West Tankers Inc v RAS (Riunione Adriatica Di Sicurtà) SpA and others, 'The Front Comor'* [2005] EWHC 454 (Comm), paragraph 42.

¹² Note 9, paragraphs 13 and 42. See also Case C-159/02: *Turner v Grovit* [2004] ECR I-3565.

the English courts would be regarded by the Italian courts as an unacceptable interference by the English courts in their procedures and should therefore be refused by analogy with principles advanced by Turner v Grovit".¹³

The High Court rejected these submissions, holding that *Turner v Grovit* concerned an application for an anti-suit injunction restraining litigation in Spain in breach of an exclusive jurisdiction agreement which itself fell within the scope of Brussels I. Accordingly, the court held that *Turner v Grovit* does not apply to an anti-suit injunction ordering a party to cease foreign litigation where that party was in breach of an arbitration agreement¹⁴. The House of Lords, in relation to the same issue, stated that: "*In extending the application of the Regulation to orders made in proceedings to which the Regulation does not apply, [the submission] goes far beyond the reasoning in Gasser and Turner v Grovit and ignores the practical realities of commerce.*"¹⁵

In relation to whether the anti-suit injunction would amount to an unacceptable interference in the Italian proceedings, the High Court reiterated the finding in the *Angelic Grace*¹⁶ and stated that "*whatever terminology is adopted – 'offended', 'affronted' or 'contrary to comity' – evidence that the foreign court would treat the order as an impermissible exercise of jurisdiction by the English courts is, as a matter of English conflicts rules, not in itself any reason to withhold such an order to procure compliance with an agreement to arbitrate*".¹⁷ It will be seen below that this indifference to the sovereignty of Italian courts could offend some of the core values of Brussels I, and therefore give rise to a clash with EU law.

It is important to note that the High Court, after careful consideration of the claims of both parties, found that the tort action before the Italian court was inconsistent with the owner's right and that the matter should be determined by London arbitration. The court's sentiment was clearly supportive of international arbitration. The court reiterated the approach adopted

¹³ Note 9.

¹⁴ Note 9, paragraph 5.

¹⁵ *West Tankers Inc v RAS (Riunione Adriatica Di Sicurtà) and others* [2007] ILPr 20, paragraph 15.

¹⁶ *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA).

¹⁷ *West Tankers Inc v RAS (Riunione Adriatica Di Sicurtà) and another, 'The Front Comor'* [2005] EWHC 454 (Comm), paragraph 51.

by English law in the *Angelic Grace*¹⁸ that such a right is to be protected by injunctive relief in equity unless strong reasons are shown to the contrary. In relation to the latter, the court stated that the right to an anti-suit injunction is unlikely to be displaced by the fact that Italy is a more appropriate forum for litigation because the evidence relevant to the cause of action may be ‘exclusively or substantially’ located in Italy.

3.2 Brussels I and Parallel Proceedings between Court Litigation and Arbitration

Before critically assessing the European Court’s decision in *West Tankers*, it is helpful to provide a detailed analysis of the EU’s earlier jurisprudence which informed the court’s reasoning in *West Tankers*. Brussels I, by Articles 29-34 (ex 27-29), offers solutions to parallel proceedings between similar or related causes of action involving the same parties when such proceedings are brought in the courts of different Member States. However, Brussels I does not have a specific solution to the interface between arbitration and court litigation as manifested in the *West Tankers* dispute. Thus, much hung on the delineation of the scope between Brussels I and arbitration. This means that where Brussels I is found to be inapplicable, national arbitration law should decide on the treatment of such parallel proceedings. Having said this, EU law continues to have a residual role even if the matter falls outside the scope of Brussels I, as will be seen later in this chapter.

3.2.1 Article 1(2)(d) of Brussels I

Most leading reports on the interpretation of Brussels I explained that the exclusion of arbitration from Brussels I was intended to avoid the overlap between Brussels I and binding treaty law on international commercial arbitration, and particularly the New York Convention 1958¹⁹. The Jenard report, for example, stated that such exclusion of arbitration from the scope of the Brussels Convention (now the Brussels I Regulation) applies in particular to proceedings involving the recognition and enforcement of arbitral awards, or proceedings to set aside an arbitral award, or the recognition of a judgment given in such proceedings. However, it must be acknowledged that the Jenard report was somewhat vague in relation to

¹⁸ *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA).

¹⁹ The Jenard Report on the Brussels Convention, [1979] OJC59/1, at p 13.

resolving the interface between court litigation under Brussels I and arbitration. The report stated in paragraph D that:

*“The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings”.*²⁰

In the period leading up to the accession of the UK to the Brussels Convention, a committee led by Lord Kilbrandon advised that the exclusion of arbitration from the Brussels Convention ‘should be understood in the widest sense’.²¹ This ‘widest sense’ contention was later fleshed out by the UK to include ‘*all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration*’.²² On the other hand, the original Member States of the EU favoured an approach whereby the exclusion related only to court proceedings in a Member State concerning arbitration, whether concluded, in progress or to be started.²³

The Schlosser report stressed that the term ‘arbitration’ in Article 1 cannot extend to every dispute that is affected by an arbitration agreement. It stipulated that the term merely refers to arbitration proceedings.²⁴ The report drew a distinction between proceedings that were directly concerned with arbitration and proceedings that only incidentally raised the arbitration agreement. Proceedings that were directly concerned with arbitration as the principal issue, e.g. the establishment of the tribunal, the annulment or the recognition of the validity or defectiveness of an award, were outside the scope of the Brussels Convention. However, the verification, as an incidental question, of the validity of an arbitration agreement that was relied on by a litigant in order to contest the jurisdiction of the court

²⁰ Note 16, paragraph D.

²¹ See the Report of the Committee on the European Judgments Convention (October 1973), paragraph 72.

²² See the Schlosser report, [1979] OJ C59/71, paragraph 61.

²³ Note 16, paragraph 61.

²⁴ Note 16, paragraph 62.

before which he was being sued pursuant to the Brussels Convention fell within the scope of the Convention²⁵.

Thus it is clear under EU jurisprudence that Article 1(2)(d) of Brussels I excludes from the scope of the Regulation proceedings whose principal subject matter is arbitration.²⁶ In *Marc Rich & Co v Società Italiana Impianti*,²⁷ which concerned the application of the *lis pendens* principles under Article 27 (now Article 29) of Brussels I, the plaintiff was summoned by the defendant to appear before the Regional Court of Genoa, Italy, in an action for a declaration that it was not liable to Marc Rich. In return, Marc Rich commenced arbitration proceedings in London, in accordance with an arbitration agreement between the parties. The defendant refused to take part in the proceedings, which led the plaintiff to commence proceedings before the High Court in London for the appointment of an arbitrator, pursuant to section 18(2) of the (English) Arbitration Act 1996. Impianti disputed the validity of the arbitration agreement and argued that such a dispute, in accordance with Article 2 (now Article 4) of the Brussels I Regulation, should be adjudicated in Italy. Marc Rich, on the other hand, took the view that the dispute fell outside the scope of the Regulation, invoking Article 1(2)(d).

The European Court stated that, in order to decide whether the proceedings fall outside the scope of the Regulation, reference must be made solely to the subject matter of the dispute. If the subject matter of the dispute falls outside the scope of the Regulation, such as a dispute concerning the appointment of an arbitrator, or a declaration regarding the validity of the arbitration agreement, then the proceeding is not within the scope of the Regulation. The court then examined the case before it, and ruled that: ‘the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator’.²⁸

A decision by the European Court, in *Van Uden Maritime v Deco-Line*, concerning the relationship between Article 1(2)(d) and Article 31 (now Article 35) of Brussels I regarding

²⁵ See also the Evrigenis and Kerameus report, [1986] OJ C298/1, paragraph 35.

²⁶ See Stone P., *EU Private International Law*, 3rd edition, Elgar European Law, 2014, at p. 39. See also Case C-190/89: *Marc Rich v Impianti* [1991] ECR I-3855.

²⁷ Case C-190/89: [1991] ECR I-3855.

²⁸ Case C-190/89: *Marc Rich v Società Italiana Impianti* [1991] ECR I-3855, paragraphs 26-28.

provisional measures, was argued on the basis of the Schlosser Report.²⁹ The court stated that the Regulation does not apply to judgments determining the validity of an arbitration agreement, the revocation, amendment, recognition and enforcement of arbitration awards, or ancillary matters to arbitration, such as the appointment or dismissal of an arbitrator.³⁰ The European Court determined that the subject matter of the dispute was the payment of arrears, contractually agreed by the parties, and thus fell within the *ratione materiae* of Brussels I. Based on the reasoning in *Marc Rich*, the court decided that Article 35 (ex 31) may confer jurisdiction on the court hearing such applications ‘*where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators*’.³¹

Unsurprisingly, the problematical cases often concerned arbitration as an incidental matter to main proceedings that fell within the scope of Brussels I, such as the Syracuse proceedings in *West Tankers*. In the past, however, there was a mistaken opinion that such issues were unlikely to be problematical. For example, the Schlosser report, perhaps lacking a full appreciation of the complexity of proceedings involving arbitration as an incidental matter, stated that the difference in views ‘*led to a different result in practice only in relation to one particular question, namely whether recognition and enforcement of a judgment could be refused in another state on the ground that the proceedings were brought in breach of an arbitration agreement*’. As was seen above, and will be reiterated below, this proves to be somewhat over-optimistic and imprecise.

The report also acknowledged that the problems in the interpretation of article 1(2)(d) would be addressed by (at the time) new Member States in the implementing legislation.³² This would be supported, it was stated, by the fact that the majority of Member States had acceded to the New York Convention 1958.³³ It will be seen in section 7 of this article that whilst the New York Convention has led to a substantial harmonisation among signatory states in their

²⁹ [1979] OJ C59 at p. 93.

³⁰ Case C-391/95, [1996] ECR I-7009, paragraph 32.

³¹ *Van Uden Maritime v Deco-Line*, paragraph 34.

³² The Schlosser Report, note 19, paragraph 61.

³³ Note 19. In more recent times, all Member States have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

approach to the validity of arbitration agreements, there remain significant cultural and legal differences between the signatory states, including among the EU Member States. The danger in the above view is that Article 1(2)(d) will be influenced by national procedural law. It will also be seen in section 6 of this article that the test of scope was decisive when the European Court in *West Tankers* came to determine whether Brussels I was engaged so as to justify the application of the doctrine of effectiveness under EU law.

4 The Ruling in *West Tankers*

4.1 The Opinion of the Advocate-General

There is little doubt about the correctness of Advocate-General Kokott's opinion in the case. There were two key submissions made by the Advocate-General. Firstly, that exclusive jurisdiction to resolve a dispute by arbitration must be supported by a binding arbitration agreement. In *West Tankers*, the key inquiry was whether there was a valid arbitration agreement which included within its scope the type of claim that was brought by Allianz before the Syracuse court, namely the tortious claim. The matter was made complex due to the fact that the proceedings were brought in subrogation and based on Italian law.

The second submission relates directly to the issuance of the anti-suit injunction. Advocate-General Kokott stated that an anti-suit injunction would be "contrary to the principle of effective judicial protection which, according to settled case law, is a general principle of Community law and one of the fundamental rights protected in the Community ...".³⁴

The Advocate-General went on to say that 'divergent decisions', however exceptional, between arbitral tribunals and courts must be accepted. She thought however that "Instead of a solution by way of such coercive measures, 'the anti-suit injunction', a solution by way of law is called for. In that respect, only the inclusion of arbitration in the scheme of Regulation 44/2001 could remedy the situation". The Advocate-General's opinion that anti-suit injunctions are contrary to the principle of effective judicial protection should be welcomed since it will increase the effectiveness of Brussels I instead of undermining it. However, it will be seen that Brussels I should not be used as a catalyst for greater harmonisation in the field of international commercial arbitration, a matter which the EU Council was determined

³⁴ Note 31, paragraph 58.

to resist when it considered the amendments proposed by the EU Commission as a way to solve the problems caused by the interface between court litigation and arbitration within the system of Brussels I.

It follows, first, as noted by Kokott AG in paragraph 57 of her opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle ‘that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it’. Moreover, the Advocate-General stressed that the use of an anti-suit injunction would undermine the underlying principle of trust and confidence whose importance to the system of Brussels I was stressed in *Turner v Grovit*.³⁵

The Advocate-General rightly expressed her trust in national courts, stating that if an arbitration agreement were valid there would be no reason for a national court not to stay proceedings and refer the parties to arbitration in accordance with Article II of the New York Convention 1958,³⁶ to which all Member States are signatories, and whose supremacy over Brussels I is specifically confirmed in the revised version of the Regulation.

4.2 The Judgment of the European Court

The European Court made it clear that the proceedings in London concerning the anti-suit injunction fell outside the scope of Brussels I, as a result of the operation of Article 1(2)(d), since they were ancillary proceedings in support of arbitration. Despite this, the European Court found that such proceedings could still undermine the effectiveness of the Regulation. In particular, the court, relying on *Marc Rich v Società Italiana Impianti*,³⁷ concluded that Brussels I applied to the Italian proceedings. Consequently, it ruled that the use of an anti-suit injunction “*would amount to stripping that court of the power to rule on its own jurisdiction*”, would undermine the ‘trust’ between Member States in the current system under the Regulation, and would deprive a party of access to a judicial remedy.³⁸

³⁵ Note 31, paragraph 24.

³⁶ Note 31, paragraph 73.

³⁷ Case C-190/89, [1991] ECR I-3855.

³⁸ For example, see recitals 1, 3, 16 and 17 of the original version of the Brussels I Regulation.

5. The Clash of Values between the System of Brussels I and International Commercial Arbitration: Why *West Tankers* was a Correct Decision

In this section, the authors identify the policy considerations and rationale behind the *West Tankers* decision. It shows that the system of international commercial arbitration challenges two fundamental values of the Brussels I regime, which have been brought to the fore by *West Tankers*. This clash of values has become more prominent in recent years due to the increase in popularity of international commercial arbitration, which has become the most popular mechanism in western legal systems for the resolution of international commercial disputes.

5.1 Theoretical Clash: Power Theory v Party Autonomy

The first clash can be described as a clash of competing theories. In commercial litigation, the jurisdiction of a court over a dispute can be explained by two main theories. The first theory explains the court's jurisdiction as an expression of power. Power theories envisage that jurisdiction *in personam* can be properly exercised over a defendant if the 'legal order' has, directly or indirectly, an effective hold over the defendant. There is little consideration for litigational fairness and convenience.³⁹ For example, the Brussels I regime expresses this power by adopting the domicile principle as the default rule on exercise of jurisdiction by the court. In addition, its rejection of the *forum non conveniens* doctrine within the system of Brussels I strengthens the influence of the power theory.⁴⁰ This is also explicit where there is a requirement of a certain nexus between the dispute and the state of the court seised of the dispute, such as a dispute envisaged by Articles 7(1) and (2) (ex 5(1) and (3)). In these situations, adjudicatory jurisdiction must be based on the existence of a particularly close connecting factor between the putative forum and the dispute, which justifies derogation from the principle of 'domicile' in compliance with sound administration of justice and efficacy of proceedings.⁴¹

³⁹ Von Mehren, T., A., *Adjudicatory Jurisdiction: General Theories Compared and Evaluated* (1983) 63/2 Boston University Law Review 279, at 285-87.

⁴⁰ Case C-281/02: *Owusu v Jackson and Others* [2005] ECR I-1383.

⁴¹ See Stone, P., *EU Private International Law*, 3rd edition, p. 75.

There is a close link between power theories and state sovereignty. “Jurisdiction is manifested as an exercise of power and is necessarily based upon a legal system invested with sovereignty. This interdependency explains why jurisdiction is defined and understood as a material and compulsory realisation of the legal order in a given case”.⁴² The English Court of Appeal, by confirming the anti-suit injunction, challenged the very foundation of power theories that is inherent in the system of Brussels I.

The fairness theory, on the other hand, modifies the exercise of jurisdiction by introducing fairness and convenience considerations into the assessment.⁴³ This theory often works in combination with the power theory. An example of this is the protective regime of the consumer under Articles 17-19 (ex 15-17) of Brussels I. There, for example, where all conditions are satisfied, the consumer can opt to bring proceedings against the business at the consumer’s domicile. Furthermore, businesses are prohibited from bringing proceedings other than at the place where the consumer is domiciled.⁴⁴

It is important to understand that both theories under the system of Brussels I will be applied in conjunction with the ethos of certainty of proceedings, which requires that a normally well-informed defendant be able to reasonably ‘*foresee before which courts, other than those of the State in which he is domiciled, he may be sued*’.⁴⁵ This is very important because it shows that there is limited space in the system of Brussels I for judicial pragmatism. For example, in *Gasser* the European Court refused to entertain arguments based on convenience and fairness considerations, and favoured an approach which provides certainty of proceedings. In that case an Italian party started proceedings in Italy in breach of an exclusive choice of Austrian courts. There was a reasonable suspicion that the proceedings had been primarily motivated by the availability of dilatory tactics before the Italian court. The court decided that it would be contrary to the principles of mutual trust and certainty of proceedings to allow a court of a state to ignore the *lis pendens* provision simply because the

⁴² European Parliament, Directorate General for Internal Policies, Policy Department: Citizens’ Rights and Constitutional Affairs, *Possibility and Terms of Applying Brussels I (Recast) to Extra EU Disputes*, PE [2014], page 13, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET\(2014\)493024_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf) [last accessed 02/07/2014].

⁴³ Von Mehren, T.A.

⁴⁴ See also Farah, Y., *Allocation of Jurisdiction and the Internet in EU Law* [2008] ELR 33.

⁴⁵ Case C-26/91: *Handte v Traitements Mécano-Chimiques des Surfaces* [1992] ECR I-3967.

court first seised was either seised mainly for dilatory reasons by a debtor, or because the duration of proceedings in that forum were excessively long.⁴⁶

The system of international commercial arbitration on the other hand is founded on the autonomy theory. The jurisdiction of an arbitral tribunal is primarily established by consent, and relies on the theory of ‘party autonomy’,⁴⁷ through the institution of contract.⁴⁸ Thus the source of legitimacy of the tribunal’s jurisdiction is founded on contract.⁴⁹ This theory has become entrenched and deeply rooted in the system of international commercial arbitration. Nevertheless, the power and fairness theories are not completely removed from the system of international commercial arbitration. Francis Mann stipulated that the autonomy of the parties and their rights and obligations are conferred on the parties by the virtue of a municipal legal system.⁵⁰ Accordingly, party autonomy is not absolute, and national courts can still declare an arbitration agreement invalid, or interfere with a chosen arbitral procedure that contravenes due process.

Based on Mann’s observation, and the practice of international commercial arbitration, an arbitration agreement can be declared invalid if, for example, it is found to be unfair. A dispute subject to a valid arbitration agreement can be declared non-arbitrable for public policy considerations at the seat of arbitration under Article II(3) of the New York Convention 1958, or when considering a challenge to the recognition and enforcement of an award under Article V(2)(b) of the Convention. Thus, one can begin to see how power and fairness theories play a role in delineating the jurisdiction of the arbitral tribunal. It is however important to note that the role of the fairness and power theories seems to be ancillary to the main ethos of party autonomy, which is said to dominate and inform the practice of international commercial arbitration. Lew, for example, argues that party

⁴⁶ Case C-116/02: *Erich Gasser GmbH v MISAT SRL*, paragraphs 68-69.

⁴⁷ Redfern, A., Hunter, M., et al., *Martin and Hunter on International Commercial Arbitration*, 2009, OUP, Chapter 3.

⁴⁸ Paulsson, J., *Arbitration unbound: Award detached from the Law of Its Country of Origin* [1980] 358 [???] *International and Comparative Law Quarterly* 367. Consent can be manifested by an arbitration agreement, agency, succession, and subrogation.

⁴⁹ Carbonneau, T., *The Exercise of Contractual Freedom in the Making of Arbitration Agreement* [2003] 36 *V and J. Transnat’l L.* 1189, at 1193.

⁵⁰ Mann F.A., *Lex Facit Arbitrum*, in Martin Domke and Peter Sanders, *International Arbitration: Liber Amicorum for Martin Domke*, 1967, Martinus Nijhoff, The Hague.

autonomy remains the driving force of arbitration, and therefore the influence of national law and national courts is greatly reduced.⁵¹

This theoretical clash explains why it is somewhat difficult for a national court to decline jurisdiction in favour of the arbitral tribunal when such exercise is required under Brussels I. It is not an assessment of what best serves the interest of the parties. Rather, it is an assessment of what best serves the system of Brussels I in the greater scheme of the internal market.

5.2 Community Interest v Disputants' Interest

Secondly, and being a derivative of the first value, Brussels I is fundamentally founded on the principle of 'mutual trust' that each state accords to the legal system and judicial institutions of the other contracting states. It is this mutual trust that enables a compulsory system of jurisdiction which all courts must respect.⁵² This value expresses the EU's integrationist aspiration, and the primary objective of Brussels I of eliminating conflicting court decisions, and improving the functioning of the internal market as envisaged under Article 65 of the TFEU.

The system of international commercial arbitration, on the other hand, is driven by private values. The main task entrusted to arbitrators is the resolution of the dispute between the disputants. This has been aptly described by Lord Hoffman in *West Tankers*. He stated that 'People engaged in commerce choose arbitration in order to be outside the procedures of *any* national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broadly equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices'.⁵³

⁵¹ Lew, J., *Achieving the dream: Autonomous Arbitration*, (2006) 22/2 *Arbitration International* 179 at 181.

⁵² Case C-116/02: *Erich Gasser GmbH v MISAT SRL* [2003] ECR I-14693, paragraph 72.

⁵³ [2007] UKHL 4 at [17].

The system of international commercial arbitration accordingly has evolved over the years into a system which is normatively aligned with values that seek the optimisation of procedural efficiency, a movement hitherto to the private sphere and at times at the expense of constitutional values.⁵⁴ Thus, there has been a gradual shift of power to the tribunal in matters such as the determination of the competence of the tribunal, review of competence, access to justice, the procedure itself, the control of arbitral awards, and recognition and enforcement of arbitral awards. There has further been a process of internationalisation of arbitration law in certain jurisdictions by aligning local law to the demands of international practice and international comity.⁵⁵

Returning to *West Tankers*, a key argument which was presented by West Tankers was that the Italian proceedings were inefficient and constituted in part dilatory tactics by the Italian party. The shipowners demanded a response from an English court to safeguard procedural efficiency and prevent parallel proceedings that were clearly highly complex and expensive. Lord Hoffman and Lord Mance supported such a request in their speech when making the preliminary reference to the European Court.⁵⁶ However, the European Court reminded us of a clash that is underlined by a mixture of philosophical and normative stands, that far exceed and which are more valuable than the disputants' own interest in having their dispute resolved by a choice which had arguably been made in the arbitration agreement, and which would have been, under normal conditions, a more efficient and suitable mechanism with which to resolve the dispute. The European Court reasoned that under the principle of mutual trust, explained above, the English court should trust that the Italian court seised of the parallel proceedings would stay or decline proceedings should the proceedings before it be brought in breach of a valid and binding arbitration agreement.⁵⁷

⁵⁴ For a more thorough analysis of the tension between procedural efficiency and constitutional values, see Marrani, D. and Farah, Y., *ADR in the Administrative Law - A Perspective from the United Kingdom*, in Dragos D. and Neamtu B. (eds), D. [*** ???], *Administrative Dispute Resolution in Administrative Proceedings*, Springer, 2014.

⁵⁵ See *Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd*, [2000] 1 QB 288, [1999] 3 All ER 864 where the English court ignored its domestic approach to public policy in favour of an international reading of Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), which allows challenges to the recognition and enforcement of arbitral awards for public policy imperatives. See also Lew J., *Achieving the Dream: Autonomous Arbitration* (2006) 22/2 Arbitration International 179.

⁵⁶ See *West Tankers Inc. v RAS (Riunione Adriatica Di Sicurtà) and others* [2007] ILPr 20.

⁵⁷ Case C-185/07: *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663.

6. Efficiency of Arbitral Proceedings v Constitutionalism of EU Law

In *West Tankers*, the European Court held inter alia that the use of an anti-suit injunction by the House of Lords would deprive a party of access to a judicial remedy.⁵⁸

The requirement of effectiveness is a fundamental legal principle of EU law.⁵⁹ This principle, which is also referred to under the notions of effective judicial protection or *effet utile*, is a rule used by the European Court in the interpretation of treaties and more particularly in the interpretation of EU law.⁶⁰ The principle was developed by the European Court as a general legal obligation for national courts to give adequate effect to EU law in their case decisions.⁶¹ Namely, it is applied so that national procedural law gives adequate effect to rights and remedies derived from EU legislation. Moreover, this principle sets up the rule that national courts must not make the enforcement of EU rights impossible or excessively difficult.⁶² Henceforth, the principle of effectiveness enables the European Court to draw and give effect to the aims and purpose of the various legislative texts that constitute the bulk of EU law.⁶³

The importance of the requirement of effectiveness emerged in the 1990s in a number of cases, including the leading case of *Factortame I*.⁶⁴ This requirement has gained prominence in the European Court's decisions, as there was a need to balance the national procedural

⁵⁸ Case C-185/07: *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR I-663, paragraphs 28-31.

⁵⁹ Craig, P. P. (Paul P.) and De Búrca, G. (Gráinne), *EU law: text, cases, and materials*, Oxford University Press, 5th edition, 2011, p. 218.

⁶⁰ Mayr S., *Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Efficacy as a Meta-Rule*, (2012/13) 5/2 European Journal of Legal Studies 11.

⁶¹ Craig, P. P. (Paul P.); De Búrca, G. (Gráinne), p 218.

⁶² Mak, Ch., *Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters*, Amsterdam Law School Legal Studies Research Paper No. 2012-88, Centre for the Study of European Contract Law Working Paper No. 2012-11, available at <http://ssrn.com/abstract=2126551> [last accessed 06/07/2014], p. 5.

⁶³ Mayr, S., p. 11.

⁶⁴ Case-C-213/89: *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433.

autonomy of the courts and the need to enforce the effectiveness of EU rights.⁶⁵ It was held in *Factortame I* that any national legal provision or any legislative, administrative or judicial practice which might impair the effectiveness of EU law and prevent it from being implemented fully is incompatible with EU law.⁶⁶ In this case, the European Court placed strict emphasis on the application and implementation of the principle of effectiveness and on the importance of the right to effective judicial protection under EU law.⁶⁷ This decision has thereafter established a robust application of the principle by the European Court when interpreting and applying EU law.

The legal foundations of the principle can be found in Article 47 of the EU Charter of Fundamental Rights which provides that “*everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*” The European Court relies on this provision as a foundation for the application of the principle of effectiveness.⁶⁸ Therefore, the principle of effectiveness enables an effective protection of individuals’ rights and remedies arising out of EU law. More particularly, the principle enforces the right to an effective remedy to which individuals are entitled in respect of rights ensuing from EU law. In addition, Article 19 TFEU (ex Article 220 EC) provides that national courts are under a duty to ensure the right to an effective remedy when applying EU law. It states that: “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*” Pursuant to this provision, national courts applying the right to an effective remedy will have to ensure that national remedies that are available under national civil procedure do not compromise the right to an effective remedy.⁶⁹

6.1 Effectiveness of EU Law and Access to Justice

In order for the courts to enforce the principle of effective judicial protection of rights arising from EU law, the individuals would need to have the right of access to justice. This is also

⁶⁵Craig, P. P. (Paul P.) and De Búrca, G. (Gráinne), p. 223.

⁶⁶ See also Case 106/77: *Simmenthal* [1978] ECR 829.

⁶⁷ See Craig, P. P. (Paul P.) and De Búrca, G. (Gráinne), p. 227.

⁶⁸ See Craig, P. P. (Paul P.) and De Búrca, G. (Gráinne), p. 218; for example, see Cases C-317/08, 318/08 and 320/08: *Rosalba Alassini and others* [2010] ECR I-2213.

⁶⁹See Mak, Ch., p. 8.

safeguarded by Article 6 of the ECHR, which disposes of the right of access to justice.⁷⁰ The European Court has also derived from its interpretation of Article 47 of the EUCFR that it addresses both the need to safeguard access to justice, and to enforce effective judicial remedies.⁷¹ The European Court's position on the connection between the right of access to justice and securing adequate remedies pursuant to EU law was illustrated in cases such as *Heylens*,⁷² *Tele2*⁷³ and *Mono Car Styling*.⁷⁴ In these cases, the European Court held that the right of access to justice is at the basis of the enforcement of EU law rights and that it is therefore a crucial element in the application of this legal system.⁷⁵

6.2 Engaging access to a remedy and access to justice in the system of Brussels I

EU constitutional principles had a bearing on the court's reasoning not to allow the use of anti-suit injunctions when Brussels I is engaged in two ways. Firstly, the European Court declared that an anti-suit injunction is incompatible with Brussels I because the Tribunale di Siracusa was not given the chance to decide on its own jurisdiction in accordance with the provisions of Brussels I⁷⁶.

Secondly, the European Court reasoned that the anti-suit injunction restrained the subrogated insurer from commencing and continuing proceedings before the Italian court. This prevented the party from being able to benefit from an adequate protection of its rights by access to the

⁷⁰Mak, Ch., p. 2.

⁷¹ van Gerven W., *Of Rights, Remedies and Procedures* (2000) 37 Common Market Law Review 501; Micklitz H.W., *The ECJ between the Individual Citizen and the Member States - A Plea for a Judge-Made European Law on Remedies*, in Micklitz H.W., and De Witte, B. (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Inter Sentia, 2012), 349-400; Reich, N., *The Principle of Effectiveness and EU Contract Law*, presentation at the SECOLA conference, "Principles and Specific Rules in European Contract Law," Messina, 1 June 2012, in Mak, Ch., p. 2.

⁷² Case 222/86: *UNECTEF v Heylens* [1987] ECR 4097.

⁷³ Case C-426/05: *Tele2 Telecommunication GmbH v Telekom-Control-Kommission* [2008] ECR I-68.

⁷⁴ Case C-12/08: *Mono Car Styling SA, in liquidation v Dervis Odemis and Others* [2009] ECR I-6653.

⁷⁵ Craig, P. P. (Paul P.) and De Búrca, G. (Gráinne), pp. 236-237.

⁷⁶ Sir Anthony Clarke, *The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales* [2007] *European Business Law Review* 101 at 115-119, in Santomauro, P., *Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001* (2010) 6/2 *Journal of Private International Law* 281 at 293.

Italian court for a remedy through engaging Article 5(3) (now Article 7(2)) of Brussels I. As a result, this undermined the insurer's right of access to justice and access to effective remedies and effective judicial protection which are facilitated by Brussels I, and enshrined as fundamental principles under Article 47 EUCFR. Consequently, the right to effective remedies, namely the right to obtaining an effective judicial protection as a result of the applicability of Brussels I, was undermined by the anti-suit injunction in this case, thereby undermining the effectiveness of Brussels I.

It is worthwhile noting that there was nothing controversial in *West Tankers*' application of the principle of effectiveness or effective judicial protection, even if the anti-suit injunction was aimed at protecting arbitral proceedings which are perfectly able to safeguard access to an effective remedy, albeit not judicial. The European Court simply reiterated Member States' obligations to respect EU constitutional principles.

It is worth pointing out that it is not the mere referral to arbitration that the anti-suit injunction had set out to achieve which was controversial in terms of access to justice, as it goes without saying that under established case law it is recognised that arbitration as a system of dispute resolution satisfies the constitutional requirement of access to justice.⁷⁷ It is however the denial of access to the remedies provided under Brussels I that was at issue. The EU Commission's proposal, which will be seen below, would have mitigated the potential for such a clash between referral to arbitration and Brussels I. However, as explained above and as will be seen in the following sections of this chapter, Brussels I is not the ideal forum for deepening EU harmonisation in the field of international commercial arbitration.

7. National and International Law Responses to Parallel Proceedings

The above discussion highlights that the relationship between Brussels I and arbitration should be confined to an inquiry of scope. In this section, the authors provide analysis of existing provisions under international and national law that may have a bearing on the issues presented in *West Tankers*. It demonstrates the diversity between national laws on key aspects that arise during parallel proceedings between court and arbitration. It analyses the doctrines of 'negative competence-competence', and the 'prima facie review' under international law and through a comparative analysis of national arbitration laws, and demonstrates that a permissive application of these doctrines would hold the answer to averting costly

⁷⁷ See Cour d'Appel [regional court of appeal] Paris, 1e ch., 17 Nov 2011, n° 09/24158, for example.

proceedings such as those experienced in *West Tankers*. The degree of acceptance of these doctrines in a given legal system essentially determines the level of deference accorded to the arbitral tribunal.

Furthermore, the analysis helps the reader to appreciate why a solution under international law, or co-ordinated international reform, has a better prospect of removing the risk of lengthy parallel proceedings than a solution within the system of Brussels I, whilst at the same time preserving the values of Brussels I.

The doctrine of ‘*prima facie* review’ is widely understood to mean that the court will stay or decline jurisdiction unless it is ‘manifest’ that the arbitration agreement is null and void, inoperative or incapable of being performed. The attraction of a *prima facie* review is that it should prevent dilatory tactics, and improve the efficiency of arbitration by deferring the full review of the validity of the arbitration agreement to the arbitral tribunal. The shortcomings of such an approach however are that the court will not have the opportunity to finally deal with any objections as to the jurisdiction of the tribunal, and which at a later date may prove to be expensive.⁷⁸

The doctrine of ‘negative competence-competence’ on the other hand, which is relevant to the doctrine of ‘*prima facie* review’, stipulates that in addition to the almost universal rule that the arbitral tribunal has the competence to decide on its own competence, including the validity of the arbitration agreement, there is an implied promise that the national court will not determine its jurisdiction on the matter which is subject to an arbitration agreement prior to the arbitral tribunal’s making a decision on its own jurisdiction.⁷⁹ In the example of *West Tankers*, an application of the doctrine of negative competence-competence would have required the Italian court to stay proceedings until the London arbitral tribunal had had a chance to determine the validity of the arbitration agreement that was contested by the claimant before the Italian courts.

Thus, it will be seen in the following discussion that the solution to the procedural inefficiencies experienced at *West Tankers* can be significantly mitigated by a co-ordinated

⁷⁸ Bachand, F., *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal’s Jurisdiction* (2006) 22/3 *Arbitration international* 463 at 463.

⁷⁹ Graves J., *Court Litigation over Arbitration Agreements: is it Time for a new Default Rule?* (2012) 23 *American Review of International Arbitration* 113 at 116.

reform to national or international law in order to accord a higher degree of deference to the arbitral tribunal.

7.1 International Law and International Documents

The international law response to parallel proceedings between court and arbitration, or the risk of it occurring, is primarily addressed in Article II(3) of the New York Convention 1958, which requires a national court to stay proceedings brought in breach of an arbitration agreement and to order the parties to resort to arbitration. In most cases, this provision would be sufficient in itself to help avoid parallel proceedings and potentially inconsistent decisions involving similar or related matters. Article II (3) of the NYC 1958 states that:

*“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”*⁸⁰

The New York Convention, being the only international law treaty on this issue, has played an important role in mitigating the procedural inefficiencies associated with the *West Tankers* saga. It has been consistently accepted by courts and commentators that Article II(3) is a mandatory article, and national courts have no discretion on whether or not to grant a stay of proceedings when all conditions of Article II(3) have been met. Moreover, it is worthwhile pointing out that given the pro-enforcement attitude of courts to the New York Convention 1958, courts have followed a restrictive approach when applying the exceptions to the requirement to stay proceedings which are listed in the second indent of Article II(3); that is, in the assessment by the court seised of whether the arbitration agreement is “null and void, inoperative or incapable of being performed”.⁸¹

However, the New York Convention 1958 has its shortcomings. It is not clear from the language of the Convention, which was drafted over 50 years ago, whether the Convention calls for the negative effect of the competence-competence principle, or whether it calls for a simple positive requirement to stay proceedings brought in breach of an arbitration

⁸⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

⁸¹ Van den Berg, A.J., *The New York Convention of 1958: An Overview*, p 10; available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf [last accessed 10/08/2014].

agreement. It is important to highlight here that the European Court explicitly stated in *West Tankers* that its decision does not contradict the New York Convention. Accordingly, there is an implicit acknowledgment in this decision that the Convention does not call for a negative effect empowering a constituted arbitral tribunal to have the first say on the validity of the arbitration agreements and its competence. Otherwise, the New York Convention would have prevailed by virtue of Article 71 of Brussels I, and now under the specific reference in Article 73(2) of the revised version of Brussels I.

Moreover, there is nothing in the language of the New York Convention to suggest that courts should limit themselves to a *prima facie* review of the validity of the arbitration agreement. Whilst it is rational for a court other than a court of the chosen seat, such as in the case of Italian proceedings in *West Tankers*, to follow a *prima facie* approach, the New York Convention (unless given a creative interpretation) does not call for such an obligation.⁸²

Furthermore, the international approach as represented under the UNCITRAL Model Law, which is a seminal international document aiming at the harmonisation of international commercial arbitration laws, does not provide a clear answer. The main provisions that have a direct bearing on the *prima facie* review and negative competence-competence approaches are contained in Articles 8 and 16 of the Model Law respectively.

The drafting history of the Model Law shows that the negotiating parties were divided as to the extent of review of the validity, operativeness, performability, and applicability of the arbitration agreement.⁸³ During the drafting process of the UNCITRAL Model Law, the UNCITRAL Working Group proposed limiting the application of the second indent of Article 8 to situations where the arbitration agreement is found to be “*manifestly null and void*”⁸⁴ [emphasis added], in what would arguably have been a step closer to adopting a *prima facie* review of the validity of the arbitration agreements.⁸⁵ However, the final text omitted such an addition.

⁸² Graves, J., *Court Litigation over Arbitration Agreements: is it time for a New Default Rule?* [2012] 23 American Review of International Arbitration 113 at 123.

⁸³ Essentially, the second indent of Article 8 of the UNCITRAL Model Law, and the corresponding provision under Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

⁸⁴ UNCITRAL Third Working Group Report (28 March 1983) A/CN.9/233, paragraph 77.

⁸⁵ Kawharu A., *Arbitral Jurisdiction* (2008) 23 New Zealand Universities Review 238 at 249.

Furthermore, the drafting history shows that there was disagreement as to whether the competence-competence principle should also include its negative implication discussed above. For example, the US delegates preferred a text that would allow the arbitral tribunal to decide on its jurisdiction first. This was met by objections from the representative of the United Kingdom, who favoured a text which would allow the national court to finally determine the tribunal's jurisdiction.⁸⁶ The final version of Article 8 of the Model Law did not include any explicit stipulation that categorically resolves this issue. The same can be said in relation to Article 16 of the Model Law, which adopts a restrained version of the competence-competence principle, without making an explicit adoption of the doctrine of 'negative competence-competence'.

The above discussion demonstrates that the position of these doctrines under international norms is, to put it mildly, contentious. The reader will see further that as a result, national arbitration laws are divided in their approach.

7.2 Comparative National Laws of EU Member States

The *West Tankers* saga has exposed the diversity in approach among courts of Member States in relation to the degree of deference which they are willing to confer on the arbitral tribunal when deciding the jurisdictional issue. One cannot escape the conclusion that the practice of international commercial arbitration can be highly parochial at times. On one side of the spectrum are national laws that have little regard for the 'prima facie review', and 'negative competence-competence' doctrines, such as is the case under Italian arbitration law. On the other side of the spectrum are national laws, such as French arbitration law, which allow great deference to the arbitral tribunal, and adopt with minimum reservations the doctrines of '*prima facie review*' and negative competence-competence. We will now turn to the analysis of certain national arbitration laws of selected Member States in order to demonstrate this diversity.

French arbitration law is considered to fall on the far end of the spectrum and adopts an approach that is characteristic of the pro-arbitration attitude of French arbitration law in the context of international arbitration. Article 1448 of French Arbitration Act stipulates that:

⁸⁶ See note 86.

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable”.

According to Article 1448, the court must decline jurisdiction and refer parties to arbitration where a tribunal has been seized of the dispute.⁸⁷ This is a strong application of the doctrine of negative competence-competence. Furthermore, Article 1448 only requires a *prima facie* review of the validity of the arbitration agreement, as opposed to a full review of the merits, where a tribunal has not been seized of the dispute.

Turning to Italian law, which can best be described as falling on the other side of the spectrum, one can see that at the time of the proceedings in *West Tankers*, Italian law had little regard for the doctrines of negative competence-competence, and *prima facie* review. However since 2007 Italian law has been amended with a view to improving, inter alia, the efficiency of proceedings involving parallel proceedings between court actions and arbitration. Article 819 of the amended Italian Arbitration Act stipulates that parties contesting the competence of an ordinary judge, such as in the Syracuse proceedings, can approach the Corte di Cassazione for a speedy and final ruling on the competence of the judge.⁸⁸ This approach is a far more favourable provision to international arbitration and the issue of parallel proceedings than that which was applicable at the time of the Syracuse proceedings. Admittedly this is not a clear adoption of any of the doctrines discussed above. However, it is a step closer to improving procedural efficiency in situations similar to the Italian *West Tankers* proceedings.

English law is located in the middle ground of the spectrum. Section 9 of the English Arbitration Act 1996 does not explicitly recognise any of the doctrines discussed above. In principle, English courts have favoured a full judicial review of the jurisdiction of the tribunal. Recent cases, however, suggest that there is a judicial movement towards allowing greater deference to the arbitral tribunal. The court in *Fiona Trust*⁸⁹ indicated that it was a matter of preference to allow the tribunal to resolve issues surrounding its jurisdiction first.

⁸⁷Graves, J., pp. 116-117.

⁸⁸ Abell, L., *Note and Comment: Disarming the Italian Torpedo: the 2006 Italian Arbitration Law Reforms as a Small Step Toward Resolving the West Tankers Dilemma* (2013) 24 American Review of International Arbitration 335 at 355.

⁸⁹ *Fiona Trust & Holding Corporation and Others v. Privalov and Others* [2007] 2 Lloyd's Rep. 267.

Whilst this is not yet a turning point in the jurisprudence of English courts, it nonetheless signifies a movement towards a readiness to accept the doctrine of negative competence-competence.

The above discussion supports the opening submission of this Article that solutions or partial solutions of the challenges experienced in *West Tankers* are available or could be made available through the operation of national law. National law, in accordance with its attitude to international arbitration, can determine the degree of deference that it is willing to entrust to the arbitral tribunal. The degree of friendliness of national courts to international arbitration can be enhanced either through a process of national reform, or by greater co-ordination at the international level. Furthermore, these conclusions further support the authors' early submission that Brussels I must not be interpreted or reformed in a manner that would be a catalyst to a deeper harmonisation of national arbitration law, however useful that might seem for the efficiency of proceedings.

Against the backdrop of national and international arbitration approaches, we now turn to examine the changes that have been brought by the revised version of Brussels I, which entered into force in January 2015.

8. The Recast Brussels I

West Tankers exposed a clash between the system of international commercial arbitration and Brussels I. It also showed that when EU law is engaged, such a clash will be resolved in favour of EU law. It should be emphasised however that, as a matter of EU and national policy, this clash should be avoided, since it is in the EU's "commercial interests" that international arbitration is safeguarded.⁹⁰ It should also be emphasised that at the time of the revision of Brussels I, it was high on the agenda of the EU Commission to find a solution to the interface between court litigation and arbitration. Thus, the revised Brussels I⁹¹ reflects in part an EU response to the issues arising from *West Tankers*, which were deemed to be unacceptable.

⁹⁰ See the opinion of Darmon AG in Case C-190/89: *Marc Rich & Co AG v Società Italiana Impianti SpA (the Atlantic Emperor)*[1991] ECR I-3855.

⁹¹ EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L351/1.

The European Commission engaged in wide consultation with various stakeholders regarding the relationship between Brussels I and arbitration. The process included a Green Paper,⁹² and numerous communications between EU institutions highlighting in part that a solution must be found to the problems experienced in *West Tankers*.⁹³ The Commission found that many stakeholders were in favour of further action to be taken by the EU in order to avoid parallel proceedings between courts and arbitration, and to prevent ‘abusive litigation tactics’. However, views diverged among stakeholders of whether the proper solution should be made through the exclusion of arbitration ‘more broadly from the scope of the Regulation’,⁹⁴ or whether concrete substantive revisions should be included so as to harmonise the national law approach to parallel proceedings between court litigation and arbitration.

In an early draft, the EU Commission endorsed the latter view and recommended the addition to Brussels I in Article 29(4) of the following text: “a court seised of a dispute shall stay proceedings if its jurisdiction was contested on the basis of an arbitration agreement, and an arbitral tribunal has been seised of the case, or in cases where court proceedings relating to the arbitration agreement had been commenced in the Member States of the seat”. Undoubtedly, this proposal would have created an EU tool having a similar effect to the doctrine of ‘negative competence-competence’.

The EU Council rejected the proposed addition. Instead, the final version placed emphasis on reforms to the recitals of Brussels I. Notable changes were introduced to the recitals, which have arguably limited the scope of Brussels I in situations concerning arbitration. Furthermore, no changes were made to Article 1(2)(d) of Brussels I.

One cannot explain with great certainty why the European Council rejected the European Commission’s proposal in Article 29(4) discussed above. However, from a policy perspective, the Council’s approach reiterated that arbitration has its jurisprudential foundations in national law. This remains the case despite an increasing movement towards greater internationalisation of arbitration through permissive reading of national law,

⁹² Green Paper on the review of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009)175 final.

⁹³ Proposal For a regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), COM(2010)748 final.

⁹⁴ See note 95 above, paragraph 2.

international harmonisation, and often through a process of delocalisation.⁹⁵ Furthermore, despite critiques apportioning blame to Brussels I, the problems arising from *West Tankers* in relation to parallel proceedings have been caused primarily by the diversity among Member States in their approach to the interface between court litigation and arbitration.

The EU Council's view avoided a situation where the relationship between Brussels I and international arbitration would become one of substance rather than of scope. The former would unduly interfere with a Member State's legitimate legislative space, which is demonstrably diverse on the issue of parallel proceedings between courts and arbitration.⁹⁶ If the European Union is to go down the route of further harmonisation in the field of international commercial arbitration, it must be done holistically and in such a way as not to discriminate between those proceedings which fall within the scope of Brussels I, and those which do not.

8.2 The Main Changes introduced in the Recitals

The changes introduced in the recitals will not remove the risk of the occurrence of situations similar to *West Tankers*. What they do instead is reiterate EU jurisprudence on the relationship between arbitration and Brussels I. Nevertheless, the recitals will have a notable impact on the recognition and enforcement of a Member State's judgment concerning the validity of an arbitration agreement.

The recitals reiterate that recast Brussels I 'should not' apply to arbitration. However, recast Brussels I confirms that proceedings such as those brought before the Italian court in *West Tankers* are not prevented by virtue of the exclusion of arbitration from the scope of Brussels I. Thus Recital 12(a) specifies that nothing prevents "*courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law*".

⁹⁵ Lew, J., *Achieving the dream: Autonomous Arbitration*.

⁹⁶ See the doctrine of subsidiarity on this point.

Furthermore, Recital 12(d) confirms the rationale in *Marc Rich* and states that Brussels I “*should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award*”.

Given that no amendments have been made to the original text of Brussels I that deal with anti-suit injunctions, it is safe to submit that the reasoning in *West Tankers* has survived the reforms made in the revised Brussels I.⁹⁷

8.3 Enforcement of a Judgment given in a Member State on the Validity of an Arbitration Agreement

Perhaps the most notable clarification made in the revised Brussels I relates to the enforceability of a judgment determining the validity of an arbitration agreement. Recital 12(b) states that:

“A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question”.

Despite the non-binding nature of Recital 12⁹⁸, the above quoted statement is bound to have a substantial impact on the approach that national courts have towards the enforcement of a ruling given by a court of a Member State on the validity of an arbitration agreement. The recital expressly states that judgments on the validity of an arbitration agreement do not fall within the scope of Brussels I. Recital 12 makes clear that it is not possible to enforce a judgment given by a court of a Member State which concerns the validity of an arbitration

⁹⁷ Carducci, G., *Validity of Arbitration Agreements, Court Referral To Arbitration And Faa § 206, Comity, Anti-Suit Injunctions Worldwide and their Effects in the EU Before and After the New EU Regulation 1215/2012* [2013] 24 American Review of International of international Arbitration 515 at 543.

⁹⁸ See for example Case 24/62: *Germany v Commission* [1963] ECR 63, paragraph 18. Recitals in EU legislation are used to determine the intent of the legislator in the main provisions; see Klimas, T., and Vaičiukaitė, J., *The Law of Recitals in European Community Legislation* (2008) 15/1 ILSA Journal of International and Comparative Law 15.

agreement. *National Navigation v Endsea (The Wadi Sudr)* ⁹⁹ is a good example of a situation the aforementioned recital is intended to address.

In *The Wadi Sudr*, the central issue was whether a judgment of a Spanish court declaring that there was no binding arbitration agreement between the disputants was to be recognised and enforced under Article 33(1) of the original version of Brussels I. The decision by the Spanish court concerned whether or not an arbitration agreement was incorporated into the bill of lading which had been concluded between the parties. The Spanish court held that the arbitration clause was not incorporated into the contract and rejected the claim that it had no jurisdiction.

The respondent then started arbitral proceedings in London based on the claim that the arbitration clause was incorporated into the bill of lading pursuant to English law, and sought an anti-suit injunction against any other claim to be filed through court proceedings. On the respondent's application, the English Commercial Court ruled that the judgment by the Spanish Court regarding the validity of the arbitration agreement was not binding, as arbitration is excluded from the scope of Brussels I pursuant to Article 1(2)(d).

The decision of the Commercial Court was reversed by the Court of Appeal, which held that, following *West Tankers*, a preliminary ruling is a judgment within the meaning of the Regulation if it takes place in proceedings the main scope of which brings them within the Regulation, thus essentially reiterating the rationale in *Marc Rich* and its progeny.¹⁰⁰ Accordingly, the Court of Appeal recognised and gave effect to the judgment of the Spanish Court.

In summary, Recital 12 of the recast Brussels I Regulation has refined the rules concerning the interface between arbitration and court proceedings. This clarification is an innovation as courts of Member States will not be under any duty to recognise or enforce judgments by courts of other Member States which concern the validity of arbitration agreements, and therefore will be able to avoid *Wadi Sudr*-like situations from ensuing. By doing so, the revised Brussels I has recognised the legitimate national space of determining the validity of the arbitration agreement, especially in those systems which allow a great degree of deference

⁹⁹ [2009] EWCA Civ 1397.

¹⁰⁰ See Butler, R., and Weijburg, B., *Do Anti-Suit Injunctions Still Have a Role to Play? - An English Law Perspective* (2012) 24/2 USF Maritime Law Journal 265.

to the arbitral tribunal on the issue of the tribunal's competence. By doing so, the revised Brussels I has reminded us that the relationship between Brussels I and arbitration is essentially one of scope.

8.4 Parallel Judicial and Arbitral Proceedings: An Unresolved Problem

Subsequent to the European Court's judgment in *West Tankers*, the London arbitral tribunal was called upon to decide on two issues. Firstly, whether Allianz and Generali would have to pay damages for breach of the arbitration agreement. Secondly, the Tribunal was called upon to issue an indemnity order in an attempt to pre-empt a possible success of Allianz and Generali in the Syracuse proceedings. The tribunal, recognising that this was a matter which fell within its jurisdiction, concluded that this jurisdiction was circumscribed by the decision in *West Tankers*.

The Tribunal stated that it was under a duty to apply Community law. The tribunal stated that *"the ruling by the European Court means that insurers have the right under European law to bring proceedings in Syracuse. Accordingly it seems to us that a decision by this tribunal that insurers did not have that right would be impossible to sustain if the matter were tested again before the European Court. A competition between the right upheld by the European Court and the right to damages would, in the present state of Community law, result in a victory for the former. And this is so despite the specific provision in Article 1(2)(d)"*.¹⁰¹

The English High Court, however, allowed the appeal under section 69 of the English Arbitration Act 1996 and held that *"A related issue is whether European law required the arbitral tribunal to decline jurisdiction to grant damages or an indemnity, as the majority of the tribunal considered it should. In my judgment, the tribunal erred in reaching that conclusion. I accept Mr Bailey's submission that whilst the tribunal was bound to apply European law as part of English law, the tribunal would only have to apply the principle of effective judicial protection if it were engaged, which it was not, for the reasons he gave"*.¹⁰²

The High Court was correct in reaching its decision, and in its reading of *West Tankers*. The principle of effectiveness would not have been undermined in this case, as the European Court in *West Tankers* did not hold that the existence or enforcement of the arbitration

¹⁰¹ Paragraph 77 of the tribunal, as cited [2005] 2 All ER (Comm) 240 at 253.

¹⁰² Paragraph 64 of [2005] 2 All ER (Comm) 240 at 253.

agreement was in breach of Brussels I. Rather, it was held in *West Tankers* that impeding the right of the competent court to issue a judgment on its jurisdiction through the anti-suit injunction had undermined the right of access to justice and the principle of effective judicial protection. Thus, the principle of effectiveness was undermined to the extent that the anti-suit injunction had obstructed the application of the rights ensuing from Brussels I, and not as a result of the enforcement of the arbitration agreement. Since proceedings principally concerning arbitration fall outside the scope of Brussels I, there would not have been a breach of the principle of effective judicial protection should an indemnity have been granted by the arbitral tribunal for the breach of the arbitration agreement by Allianz and Generali. Consequently, it could be said that the claim for damages regarding the breach of the arbitration agreement by Allianz and Generali would not affect or undermine the effectiveness of Brussels I.

The revised Brussels I supports the reasoning of the English High Court. Firstly, Recital 12 affirms the possibility of conflicting decisions between a court judgment and an arbitral award concerning the same matter. Recital 12(c) recognises that “*where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation*”.¹⁰³ Equally, the revised Brussels I confirms the supremacy of the New York Convention 1958 over Brussels I, and further states in Recital 12(c) that a Member State can recognise and enforce a foreign arbitral award in accordance with the NYC 1958 despite this potentially being in conflict with a judgment of a Member State.

Be this as it may, a court seised of a request for the recognition and enforcement of an arbitral award, may, at the request of the party challenging the award, refuse recognition and enforcement of that award if evidence is furnished by the challenger that the arbitration agreement upon which the award was based is invalid under the law to which the parties had subjected it, or in the absence of a choice, the law at the place where the award was made.¹⁰⁴ This arguably brings us back to square one, and an inevitable conclusion can be made that

¹⁰³ Estruplppolito, A., and Adler-Nissen, M., *West Tankers Revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?* (2013) 79(2) Arbitration 158 at 160.

¹⁰⁴ Article V(a)(1) of the New York Convention 1958.

parallel proceedings between court proceedings and arbitration are here to stay, and that the solution resides in bringing national laws into greater harmony as alluded to in Section 7 of this Article.

8.5 The irreconcilability between an award and a judgment: A missed opportunity

What is most disappointing in the revised Brussels I is its failure to respond to a possible situation where a national court is faced with irreconcilable decisions, one being an arbitral award and the other a court judgment. As an example, consider the situation where an English court is faced with two applications, one for the enforcement of a French arbitral award, and the other for the enforcement of an Italian judgment, both relating to the same matter, and the award and judgment involve contradictory conclusions as to whether there has been a breach of the substantive contract involved. Neither the original nor the new Brussels I Regulation, nor the New York Convention 1958, specifically addresses this problem in its text.

On the one hand, an English court pursuing a policy of supporting of international commercial arbitration will favour the enforcement of the arbitral award. On the other hand, the principle of effectiveness of EU law requires the giving of adequate consideration to Brussels I, and thus enforcement of the judgment of a Member State in accordance with the provisions of Brussels I. Be this as it may, the English court, faced with such a conflict, will have to come up with a solution. It is submitted here that where it considers the arbitration agreement to be valid, the English court should have recourse to English public policy, and accordingly prefer the earlier of the decisions (utilising the public policy provisions in both the New York Convention 1958, and Brussels I).¹⁰⁵ This approach is supported by the revised Brussels I, which explicitly gives supremacy to the New York Convention over Brussels I in situations falling within the scope of the latter, and therefore it indicates that on the matter of the irreconcilability between an arbitral award and a court judgment, the New York Convention should prevail.¹⁰⁶

Whatever the best answer to this problem may be, the omission of the revised Brussels I to address the problem in clear terms seems irresponsible, and a missed opportunity.

¹⁰⁵ Article V(2)(a) of the New York Convention, and Article 45(1)(a) (ex Article 34(1)) of Brussels I.

¹⁰⁶ See Article 73(2) and Recital 12(c) of Brussels I.

9. Conclusion

Brussels I has been loyal to the harmonisation of jurisdictional rules in civil and commercial matters among Member States, whilst respecting arbitration by carefully delineating its scope and safeguarding the autonomous nature of arbitration. Inevitably, however, and most uncommonly, a clash between the two spheres will occur.

This article demonstrates that it is not the exclusion of arbitration that is most worrying, but rather the prolonged parallel and potentially conflicting proceedings that had been experienced in *West Tankers*, and which are here to stay. This is demonstrably a matter that Brussels I and the system of international commercial arbitration have strived, albeit with limited success, to avert. The revised Brussels I should not be treated as a magic bullet and will not entirely remove such a risk. However, it has brought some clarity with regard to the situations when arbitration is to be excluded from the scope of the system of Brussels I.

West Tankers exposed the weakness in the system of international commercial arbitration and the (all too often ignored) parochial character of international commercial arbitration. We have emphasised that the solution to the diversity in the treatment by national laws of parallel judicial and arbitral proceedings should not be attained under the system of Brussels I. Instead, the authors have demonstrated that solutions already exist under certain national laws. Whilst these alone will not avert the irreconcilable conflict caused by the interface between court litigation and arbitration, which was at the heart of the dispute in *West Tankers*, these could however inspire greater co-ordination among Member States in view of deeper harmonisation. In particular, according greater deference to the arbitral tribunal should mitigate the inefficiencies that arise when the systems of international commercial arbitration, and Brussels I, collide.